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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1985

No. 85-5186

ROBERT W. SOUTH, Petitioner,

versus,

STATE OF SOUTH CAROLINA, Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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CERTIFICATE OF SERVICE

THE UNDERSIGNED HEREBY CERTIFIES THAT A TRUE COPY OF Brief in Opposition HAS BEEN SERVED UPON OPPOSING COUNSEL BY MAILING 1 COPIES IN AN ENVELOPE PROPERLY ADDRESSED WITH POSTAGE PREPAID THIS 30th DAY OF August, 1985

Harold M. Coombs, Jr.
ATTORNEY FOR Respondent

SWORN TO BEFORE ME THIS 30th DAY OF August, 1985

Marla J. Hinson (L.S.)
Notary Public for South Carolina
My Commission Expires 5/26/86

QUESTION PRESENTED

DID THE SOUTH CAROLINA SUPREME COURT PROPERLY FIND THAT, UNDER THE CIRCUMSTANCES OF THIS CASE, THE PROSECUTOR'S STATEMENTS REGARDING "SAFEGUARDS" DURING HIS CLOSING ARGUMENTS IN THE SENTENCING PHASE OF PETITIONER'S CAPITAL MURDER TRIAL DID NOT MINIMIZE THE JURY'S RESPONSIBILITY FOR DETERMINING THE APPROPRIATENESS OF A DEATH SENTENCE?

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OPINION BELOW

The opinion of the South Carolina Supreme Court is reported in The State v. Robert W. South, Opinion No. 22339, filed June 4, 1985, as reproduced in Petitioner's Appendix at pages A-1 through A-6.

JURISDICTION

Respondent does not question the Court's jurisdiction in this proceeding.

QUESTION PRESENTED

Did the South Carolina Supreme Court properly find that, under the circumstances of this case, the prosecutor's statements regarding "safeguards" during his closing arguments in the sentencing phase of Petitioner's capital murder trial did not minimize the jury's responsibility for determining the appropriateness of a death sentence?

ARGUMENT

The South Carolina Supreme Court properly found that, under the circumstances of this case, the prosecutor's statements regarding "safeguards" during his closing arguments in the sentencing phase of Petitioner's capital murder trial did not minimize the jury's responsibility for determining the appropriateness of a death sentence.

Robert W. South, the Petitioner herein, was arrested in April, 1983, and charged with the murder of a West Columbia, South Carolina, police officer engaged in the performance of his official duties. An indictment was issued against the Petitioner by a Lexington County, South Carolina, Grand Jury and his case was called to trial on November 7, 1983. The jury returned a verdict of guilty of murder on November 15, 1983, and in accordance with South Carolina's capital murder sentencing statute set forth in South Carolina Code Ann. §16-3-25 (1984), a sentencing hearing was held on November 17, 1983. The jury subsequently recommended the imposition of the death penalty and the Petitioner was thereby sentenced to death by the lower court. Petitioner's conviction and sentence of death were affirmed by the South Carolina Supreme Court on June 4, 1985.

It is the Petitioner's contention that certain portions of the prosecutor's closing arguments during the sentencing phase of his bifurcated trial minimized the jury's responsibility for determining the appropriateness of a death sentence and thereby affected their sentencing discretion by injecting an arbitrary factor into their deliberations. Petitioner specifically cites to the following arguments made by the prosecutor to support his assertion of error:

> He will explain to you about the mitigating part, things that the defense will say you should consider in imposing life imprisonment.
>
> And even behind all of that there are many many safeguards built into this law. There are many many guidelines, safeguards for the defendant's benefit. And I have no problems with that. I agree with that. I want it that way.
>
> We are talking about the ultimate punishment. There are even safeguards that I can't tell you about because the law says I am not suppose [sic] to tell you about them, and I have no problems with that. I am glad it is that way.

(Tr. p. 2898, line 19 - p. 2899, line 6). According to Petitioner, these closing arguments caused the jury to speculate as to what procedural safeguards might exist to provide a review of a death sentence and invited the jury to feel less ultimate responsibility for the death sentence imposed. Petitioner's contention is simply that the prosecutor's references to "safeguards" in and of itself was violative of the standard of reliability that the Eighth Amendment requires in all death penalty cases. Woodson v. North Carolina, 428 U.S. 280 (1976).

On direct appeal, the South Carolina Supreme Court addressed this issue by stating:

> The next alleged error is the solicitor's reference to procedural safeguards during his sentencing phase summation. Appellant argues this lessened the jury's sense of responsibility, while the State contends the reference emphasized the jury's responsibility. Ordinarily, the trial judge has wide discretion regarding the propriety of argument. We will not disturb his ruling. State v. Woomer, 278 S.C. 468, 299 S.E.2d 317 (1982).
>
> Furthermore, any alleged prejudice was negated. Appellant's counsel mentioned such safeguards in his

> argument. Additionally, the trial judge repeatedly charged the jury concerning their responsibilities, and the importance of their decision.

State v. South, Opinion No. 22339, filed June 4, 1985. (Appendix of Petitioner A-5).

In reversing previous death sentences, the South Carolina Supreme Court has consistently held that closing arguments in which prosecutors injected their personal opinion, Thompson v. Aiken, 281 S.C. 239, 315 S.E.2d 110 (1984); State v. Butler, 277 S.C. 543, 290 S.E.2d 420 (1982); State v. Sloan, 278 S.C. 435, 298 S.E.2d 92 (1982); State v. Smart, 278 S.C. 515, 299 S.E.2d 686 (1982); State v. Koon, 278 S.C. 528, 298 S.E.2d 769 (1982); State v. Plath, 277 S.C. 126, 284 S.E.2d 221 (1981); State v. Woomer, 276 S.C. 258, 277 S.E.2d 696 (1981), or where the prosecutors disclosed the appellate procedures available to a capital defendant, State v. Gilbert, 273 S.C. 690, 258 S.E.2d 890 (1979); State v. Tyner, 273 S.C. 646, 258 S.E.2d 559 (1979), were improper since they lessened the jury's sense of responsibility in recommending a death sentence. The South Carolina Supreme Court's holding in the present case is consistent with these prior decisions and this Honorable Court's recent decision in Caldwell v. Mississippi, 472 U.S. ___, 105 S.Ct. 2633 (1985). Therefore, this Court is not required to grant certiorari.

In Caldwell v. Mississippi, supra, the prosecutor in a capital case told the jury in closing arguments at the sentencing hearing that "they [the defense attorneys] know that your decision is not the final decision ... Your job is reviewable." Id. at 2637. The statement was objected to, but the lower court allowed the prosecutor to continue,

stating, "I think it proper that the jury realizes that it is reviewable automatically as the death penalty commands." Id. at 2638. The prosecutor continued and later stated "the decision you render is automatically reviewable by the [Mississippi] Supreme Court." Id. at 2638. Based on these statements, this Court vacated the imposition of the death sentence and held that it was "constitutionally impermissible to rest a death sentence on a determination made by a sentencer who has been led to believe that the responsibility for determining the appropriateness of the defendant's death rests elsewhere." Id. at 2639. This Court's decision was based on the deep-rooted concern that the sentencing process in a capital murder case should facilitate the responsible and reliable exercise of sentencing discretion. Lockett v. Ohio, 438 U.S. 586 (1978).

In the present case, the prosecutor's argument in its entirety, [Cupp v. Naughten, 414 U.S. 141 (1973)], does not support any inference that the jury was misled to believe the responsibility for imposing the death sentence rested elsewhere. Moreover, it is clearly evident from the arguments of trial counsel and the instructions of the trial court that there was no indication the Petitioner's sentencers did not treat their power to determine the appropriateness of death as an "awesome responsibility." Caldwell v. Mississippi, supra. The challenged arguments by the prosecutor were prefaced by the following:

> Somebody said these are the most difficult of times. It has been a difficult time for all of us. You have a most difficult and serious decision. And whatever I say here in the next minutes or so, don't let anything I say to you in anyway try to imply that your responsibility is lessened in anyway whatsoever.

> You will recommend a sentence for the judge to impose and he'll tell you that that recommendation is the sentence for him to impose. It is the sentence to be made and that is your decision.

(Tr. p. 2895, line 19 - p. 2896, line 4). (Emphasis added).

Trial counsel for Petitioner stated in his closing arguments during the sentencing phase of the trial that:

> Throughout history, as [the prosecutor] was referring to we have developed ways and safeguards about the system. To where we have now evolved, where we now have, we empanel a jury to decide the fate of an individual. That's something relatively new. The jury of twelve will decide the punishment that an individual must suffer after being convicted of murder.
>
> * * *
>
> The judge told you and will tell you that while he uses the words "recommendation" ladies and gentlemen, it is more than just a recommendation. The judge will carry out and will order whatever you decide.
>
> If you decide to recommend the life sentence that is what Robert South will receive. If you decide to recommend the death sentence that is what he will receive. But it is your decision, ladies and gentlemen, according to the legislature it has to be unanimous. It has to be unanimous. All twelve of you have to agree before the death sentence can be imposed. All twelve of you must agree and sign. And unless all twelve agree that death sentence cannot be imposed.

(Tr. p. 2928, lines 12-18; Tr. p. 2945, lines 5-18). Thus, it is apparent the prosecutor and trial counsel for Petitioner stressed the singular duty of the jury in the sentencing phase; that is, to decide whether Petitioner would live or die. Both emphasized that such decision was reserved for them and would be carried out by the trial court.

Further review of the record established that the trial court correctly instructed the sentencing jury about their ultimate power to recommend proper punishment for the Petitioner. Before the jury began its deliberations, the trial court charged the following:

> Now the order in which I explain these two sentences is in no way a recommendation by me as to which sentence you should choose to recommend. It is simply I have got to tell you one first and one second.
>
> Also remember that although I use the term recommend, the defendant will actually be sentenced to whatever you recommend. In other words, I don't have anything to do with that. That is up to you in regards to the sentence.

(Tr. p. 2961, line 19 - p. 2962, line 3). The trial court instructed the jury at the sentencing phase regarding statutory aggravating circumstances, statutory and non-statutory mitigating circumstances (See, e.g., Tr. p. 2967, line 8 - p. 2970, line 3), and their consideration of a life sentence or the death penalty. (See, e.g., Tr. p. 2969, lines 12-14; Tr. p. 2970, lines 3-13). The trial court further instructed that if the jury signed the verdict form which recommended a death sentence based upon the finding of at least one aggravating circumstance beyond a reasonable doubt, the court would proceed to carry out the sentence accordingly. (Tr. p. 2962, line 4 - p. 2963, line 17). It is, therefore, evident that the sentencing jury's role was unambiguously set forth in the trial court's instructions and the jurors in the present case were not confused or misled by the prosecutor's challenged arguments.

Inasmuch as the jurors in the present case were fully aware of their important responsibility in recommending a

death sentence for Petitioner, arguments to the contrary based upon the prosecutor's vague and isolated statements fail to establish how the jurors could have viewed the sentencing phase of the trial as a "dry run" towards the actual determination of the appropriateness of a death sentence. Two important factors distinguish Caldwell v. Mississippi, supra, from the Petitioner's case. Most important, in Caldwell the trial judge had agreed with the prosecutor's argument that a death sentence was reviewable and that the jury had a right to know this fact. These arguments were impermissible because they were inaccurate and misleading in a manner which diminished the jury's sense of responsibility in sentencing the defendant to death. Cf., California v. Ramos, 463 U.S. 992 (1983) (A California statute which permitted a capital sentencing jury to be informed that the Governor could commute life imprisonment without parole into a lesser sentence that included a chance for parole represented a valid state penological interest as to the future dangerousness of a defendant released back into society).

Secondly, in Caldwell, the prosecutor's arguments to the jury were noticeably different and inherently dangerous. The arguments in Caldwell were "quite focused, unambiguous, and strong," in that they obviously shifted the jury's sense of responsibility to the appellate court. Id. at 2645. The remarks of the prosecutor were pointedly directed at the issue this Court has described as "the principal concern of our jurisprudence regarding the death penalty, the procedure by which the State imposes the death sentence." Id., citing California v. Ramos, supra, at 999. Similar arguments by prosecutors have been struck down by the South Carolina

Supreme Court in State v. Gilbert, supra, at 697-98, 258 S.E.2d. at 894 and State v. Tyner, supra, at 658-660, 258 S.E.2d at 565-566. In the present case, the prosecutor's references to "safeguards for the defendant's benefit" and "safeguards that I can't tell you about" did not reach the level of state-induced suggestion minimizing the jury's understanding of its moral responsibilities in the sentencing phase of Petitioner's trial. Arguably, the prosecutor's challenged arguments were intended only to stress upon the jury the extreme importance of their decision and heightened rather than diminished their sense of responsibility. State v. Woomer, 278 S.C. 468, 299 S.E.2d 317 (1982), cert. denied, 463 U.S. 1229 (1983).

In the present case, the procedures employed during Petitioner's capital trial and affirmed by the South Carolina Supreme Court comported with the Eighth Amendment's prohibition against cruel and unusual punishment, which in the capital sentencing context, requires that sentencing discretion "be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action." Gregg v. Georgia, 428 U.S. 153, 189 (1976). This quest for minimal risk, however, does not require perfection. Lockett v. Ohio, supra.

The foremost consideration of the South Carolina Supreme Court on the issue raised by Petitioner was whether the prosecutor's closing arguments could have caused any reasonable juror to believe that his or her decision to impose a death sentence would be anything other than a final determination of that sentence. As JUSTICE O'CONNER stated in Caldwell v. Mississippi, supra, "Jurors may harbor misconceptions about the power of state appellate courts or,

for that matter, this Court to override a jury's sentence of death ... [H]owever, the Mississippi prosecutor's argument ... sought to minimize the sentencing jury's role by creating the mistaken impression that automatic appellate review of the jury's sentence would provide the authoritative determination of whether death was appropriate." (Emphasis in original). Id. at 2646-47. (O'Connor, J., concurring).

Thus, the challenged arguments in the present case were clearly distinguishable and did not reach the level of impropriety or danger which existed in Caldwell by emphasizing appellate review of a death sentence. In light of the entire closing arguments of trial counsel and the instructions of the trial court, the jury's role was not lessened in any manner. Each juror clearly recognized and appreciated the gravity of his or her task and made a reliable determination of a sentence based upon the evidence presented at Petitioner's trial. Nothing was exposed to the sentencing jury regarding any post-sentencing procedures available to Petitioner or that it could more freely "err because any error may be corrected on appeal." Id., at 2641, citing Maggio v. Williams, 464 U.S. 46, 54-55 (1983). (Stevens, J., concurring).

Clearly, Petitioner has failed to establish that the prosecutor's arguments minimized the jury's role in the capital sentencing procedure or diminished their responsibility to recommend a death sentence because their decision was reviewable. The South Carolina Supreme Court's decision to affirm the Petitioner's death sentence was, therefore, adequately supported by the record.

Inasmuch as the Petitioner's death sentence was recommended by a jury who was fully appreciative of and properly

instructed regarding their heightened responsibility for determining the sentence, this Petition should be denied.

CONCLUSION

For the foregoing reasons, Respondent submits that Petitioner's Petition for a Writ of Certiorari be denied.

Respectfully submitted,

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August 30, 1985
MR